IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

R.S.A.No. 48 of 1984

DECIDED ON :05.09.2007.

Ram Dev and others **.... Petitioner.**

VERSUS

Rajinder Singh and others. **...Respondents.**

CORAM : HON'BLE MR. JUSTICE PERMOD KOHLI.

Present: Mr.C.B.Goel , Advocate, with
Mr. Sudhir Aggarwal, Advocate and
Mr. Sunil Polist, Advocate, for
the appellants.

None for the respondents.

PERMOD KOHLI,J. (ORAL)

This second appeal is preferred by the defendants against the judgment and decree dated September 14, 1983 passed by Additional District Judge, Karnal, allowing the appeal preferred by plaintiff-respondent No.1 herein against the judgment and decree dated December 4, 1982 passed by learned Subordinate Judge, Ist Class, Karnal. Respondents have chosen not to appear. From the inter-locatory orders it appears that respondents are continuously absent for the last many hearings. They are, therefore, set ex parte.

Following substantial question of law has arisen in

the present appeal:-

> "Whether the plaintiff can seek declaration regarding the partition of the suit property when admittedly a mutation of inheritance has been passed by the competent authority declaring the property in dispute as coparcenary property in the presence of plaintiff and they have not challenged the alleged mutation in-any-manner."

It is admitted case of the parties that one Sadhu Ram son of Kalu Ram was the owner of suit property. Rajinder Singh-plaintiff, Ram Dev, Jai Pal and Ran Singh Smt. Ishwar Devi and Smt. Kalawati defendants 1 to 5 are sons and daughters respectively of Sadhu Ram. After the death of Sadhu Ram, a mutation of inheritance was entered and attested being Mutation No. 780 by the Assistant Collector Ist Grade dated 10.10.1979 in favour of the parties to the suit being his legal heirs. Vide this mutation it has been declared that the property of Sadhu Ram has devolved upon the parties in equal shares. Rajinder Singh son of Sadhu Ram i.e. plaintiff-respondent No.1 instituted a civil suit bearing No. 518 of 1982 dated 16.9.1980 in the trial Court, seeking a declaration that he is owner in possession of 1/4th share in the suit property and in the alternative that he may be declared to be owner of 7/30th share thereof. He claimed the partition/family settlement amongst four sons of Sadhu Ram in equal shares excluding the daughters

(defendants 4 and 5).

The suit was contested by the defendants pleading therein that the deceased Sadhu Ram left behind four sons and two daughters and no partition/family arrangement took place during his life time (Sadhu Ram) and all the sons and daughters have equal shares in the property. The trial Court framed ten issues; nine issues had been framed on 30.10.1980 by Sub Judge Ist Class, Karnal, whereas an additional issue had been framed on 7.9.1992 by Sub Judge 2nd Class, Karnal.

While deciding issue No.1, the trial Court returned the finding that the plaintiff has failed to establish family settlement/arrangement and also failed to prove that he is in possession of the suit land as a result of the family arrangement. The trial Court, however, decreed the suit, while granting alternative relief that he is owner in possession of 7/30th share of the suit land. The plaintiff-respondent highly relied upon the written statement filed by the defendants in the proceedings before the Tehsildar, Karnal initiating by defendant Ram Dev seeking partition of the suit property. The trial Court, however, held that the written statement relied upon was not duly verified according to law and cannot be taken into consideration to find out the factum of partition/family arrangement. The trial Court also referred to statement of Jai Pal, one of the defendants, who had appeared before him and made a statement on behalf of himself, his sister etc. denying any family arrangement

between the parties.

Plaintiff-respondent preferred an appeal before the Additional District Judge, Karnal bearing Civil Appeal No. 138/13 of 1983. The present appellant also preferred cross objections. The lower appellate Court vide impugned judgment dated 14th September, 1983 set aside the judgment and decree of the trial Court and decreed the suit declaring the plaintiff-respondent to be owner in possession of agricultural land measuring 7 Bighas and 7-1/2 Biswas to the extent of 1/4h share on the basis of family arrangement. This finding was returned while deciding issue No.2 framed by the trial Court. Only ground on which the First Appellate Court has reversed the judgment of the trial Court is the document i.e. written statement filed by the defendants excluding Ram Dev and the plaintiff before the Tehsildar in proceedings initiated at the instance of defendant Ram Dev. The Lower Appellate Court held that since the parties had admitted family arrangement in the suit, in the written statement before the Tehsildar, the admission itself is sufficient to prove family arrangement amongst the parties. The appellate Court also referred to the statement of Jai Pal, who appeared as DW-4 and allegedly admitted the family arrangement. It is, however, not disputed that Jai Pal as also the other defendant including two sisters of the plaintiff namely, Ishwar Dev and Kala Vati denied the family arrangement before the trial Court in their written statement and also while appearing in the witness box.

The First Appellate Court has proceeded only on the basis of the written statement filed before the Tehsildar.

I have heard learned counsel for the appellants.

The family settlement claimed by respondent Rajinder Singh was allegedly entered during the life time of Sadhu Ram. It is not in dispute that no written family arrangement was ever entered into between the parties. After the death of Sadhu Ram who died in the year 1976 the competent revenue authority entered the mutation of inheritance No. 780 dated 10.10.1979,in favour of all the sons and daughters of Sadhu Ram. During the mutation proceedings, Rajinder Singh plaintiff appeared and made an application disputing the right of the sisters in equal shares in the suit property as legal heirs of deceased Sadhu Ram. He only claimed that sisters have no share and never claimed any family arrangement during the life time of Sadhu Ram. The competent authority on the basis of evidence produced and contentions of the parties entered the mutation No. 780 declaring all the four sons and two daughters of Sadhu Ram as legal heirs of deceased Sadhu Ram and declaring them owners in possession in equal shares in the property left by Sadhu Ram. It appears that the mutation was sanctioned in the presence of parties in favour of all the legal heirs of Sadhu Ram. This mutation has not been challenged in the present suit. Though, in para No.4 of the plaint, it has been

pleaded that mutation has not been validly sanctioned but no relief has been sought for setting aside the mutation in-any-manner. In absence of their being any challenge to the mutation, the findings of the First Appellate Court are not sustainable. As a matter of fact, the mutation was the first opportunity to plead family settlement. It was only when Ram Dev one of the defendants and brother of the plaintiff made an application to the Tehsildar for partition that the plea of family settlement during the life time their father was set up. It is not known what order was passed by the Tehsildar. Merely because copy of the written statement filed in partition proceedings has been produced in the present suit and without proving that Tehsildar had passed any order accepting the plea of family settlement, the findings of the First Appellate Court can not be accepted which are totally based upon the written statement filed before the Tehsildar. The competent authority (Tehsildar) specifically found that when there was no finding regarding validity of written statement or the contention raised therein. It was the said Court/authority, who was competent to have returned finding accepting the written statement or rejecting the same. In absence of finding by that authority was not opened for the First Appellate Court to rely upon the said written statement.

Apart from that all the parties on whose behalf the written statement was filed, have disputed the validity and correctness of the written statement before the trial Court

and thus, the First Appellate Court should not have returned the finding on the basis of the said written statement ignoring all the evidence before him. As a matter of fact, written statement can be one of the best piece of evidence but cannot be relied upon in the presence of other evidence.

For the above reasons, this appeal is allowed and the judgment impugned herein, is set aside and that of the trial Court is restored.

No order as to costs.

0**5. 09. 2007** **(PERMOD KOHLI)**
Anoop **JUDGE**